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No. 07-417

In The
Supreme Court of the United States

ARTHUR J. ROSS, ET UX.,

Petitioners,

v.

BROADWAY TOWERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court Of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE* OF THE HOUSING LAW CLINIC CONSORTIUM IN SUPPORT OF PETITIONERS

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MOTION OF THE HOUSING LAW CLINIC CONSORTIUM FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37 of the Rules of this Court, the Housing Law Clinic Consortium (HLCC) respectfully moves this Honorable Court for leave to file the attached brief in the above-referenced case in support of the petition for writ of certiorari. The Petitioner has consented to the HLCC's participation in this case, and a letter indicating the Petitioner's consent has been submitted to this Court.[1]

HLCC is a nationwide organization founded by the University of Tennessee Legal Clinic representing the legal clinics of various law schools around the country. The University of Tennessee Legal Clinic filed a brief as *amicus curiae* at the state level when the Tennessee Supreme Court considered the Petitioner's request for leave to appeal. When the Petitioners appealed to this Honorable Court, the University of Tennessee Legal Clinic brought the case to the attention of other legal clinics. These clinics realized the national significance of the *Ross* decision and the impact the decision could have on their states' abilities to provide defenses to tenants in eviction proceedings. Thus, these clinics united with the University of Tennessee Legal Clinic to form the HLCC. HLCC

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[1] Respondent Broadway Towers, Inc., affirmatively denied consent. Respondent also objected at the state court level to the University of Tennessee Legal Clinic's filing of a brief as *amicus curiae*. Nevertheless, the Tennessee Supreme Court granted the University of Tennessee Legal Clinic leave to file a brief as *amicus curiae*. *Ross v. Broadway Towers, Inc.*, Order, No. E2006-00033-SC-R11-CV (Tenn. Sup. Ct. June 25, 2007).

members adhere to a two-part mission: (1) providing legal assistance to the indigent in members' respective communities and (2) engaging law students in housing and other civil cases to provide them with "real world" experience. The following legal clinics and legal clinicians are members of the HLCC:

The University of Tennessee Legal Clinic

The Economic Justice Project of the Notre Dame Legal Aid Clinic

The Michigan Clinical Law Program of the University of Michigan Law School

The Legal Clinic of the Saint Louis University School of Law

The Willamette University College of Law Clinical Law Program

Professors Russell G. Pearce & Douglass Seidman, Fordham University School of Law

The Clinical Programs of the Roger Williams College of Law

The Center for Social Justice, Seton Hall Law School

The Duke Law School Community Enterprise Clinic

Rosalie Wahl Legal Practice Center, William Mitchell College of Law

Professor Ellen M. Scully, The Catholic University of America Columbus School of Law

HLCC members provide indigent tenants with legal assistance and support in landlord-tenant cases. A substantial number of these tenants are elderly and reside in housing funded by the Department of Housing and Urban Development (HUD). Some of them have been evicted for alleged criminal activity in contravention to HUD's regulations.

This case seriously affects the HLCC because it erodes the defenses available to clients of HLCC members, making it difficult for HLCC members to predict when state law defenses will be available in a given case. Landlord-tenant law has always been governed by state law. In the aftermath of this decision, HLCC members lack guidance in how to counsel their clients and teach their students about the force of state law in landlord-tenant cases involving federally funded housing. Therefore, the HLCC respectfully requests the opportunity to advise this Court more fully on the urgency of granting the Petition for Writ of *Certiorari*.

Respectfully submitted,

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On behalf of the Housing Law Clinic Consortium:

THE UNIVERSITY OF TENNESSEE
LEGAL CLINIC
THE ECONOMIC JUSTICE PROJECT OF
THE NOTRE DAME LEGAL AID CLINIC
THE MICHIGAN CLINICAL LAW PROGRAM
OF THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
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PROFESSOR ELLEN M. SCULLY, THE
CATHOLIC UNIVERSITY OF AMERICA
COLUMBUS SCHOOL OF LAW

Amicus Curiae

STATEMENT OF ISSUE PRESENTED

Does a federal statute authorizing landlords to include in rental agreements a right to evict tenants for criminal activity preempt the laws in at least 43 states providing eviction procedures and permitting defenses to evictions?

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BRIEF *AMICUS CURIAE* OF THE HOUSING LAW CLINIC CONSORTIUM[1]

INTEREST OF *AMICUS*

The University of Tennessee Legal Clinic ("the Clinic") is the longest continuously running law school clinic in the United States. Founded in 1947, the Clinic provides legal aid and counsel to indigent persons. Housing law is one of the Clinic's principle practice areas. The Clinic regularly represents low-income tenants of public and subsidized housing who are threatened with eviction on the basis of criminal activity allegedly committed either by them or by members of their households. In these cases we defend eviction actions in state courts under Tennessee's landlord-tenant laws.

Because of the threat *Ross v. Broadway Towers, Inc.*[2] poses to the stability of landlord-tenant laws in states across the country, the Clinic contacted other Clinical Law Programs to see if they would be interested in forming a consortium dedicated to stopping the *Ross* decision's detrimental effects on state landlord-tenant law. The following professors and clinics have joined the Clinic to form the Housing Law Clinic Consortium:

The Economic Justice Project of the Notre Dame Legal Aid Clinic

The Michigan Clinical Law Program of the University of Michigan Law School

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[1] The petitioner, Ross, has granted consent for the filing of this amicus curiae brief. The respondent, Broadway Towers, Inc., has withheld consent and unsuccessfully objected to our filing in state court. *See Ross v. Broadway Towers, Inc.*, Order, No. E2006-00033-SC-R11-CV (Tenn. Sup. Ct. June 25, 2007).

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] 228 S.W.3d 113 (Tenn. Ct. App. 2006).

The Legal Clinic of the Saint Louis University School of Law

The Willamette University College of Law Clinical Law Program

Professors Russell G. Pearce & Douglass Seidman, Fordham University School of Law

The Clinical Programs of the Roger Williams College of Law

The Center for Social Justice, Seton Hall Law School

The Duke Law School Community Enterprise Clinic

Rosalie Wahl Legal Practice Center, William Mitchell College of Law

Professor Ellen M. Scully, The Catholic University of America Columbus School of Law

The Housing Law Clinic Consortium is interested in this case because the holding of the Tennessee Court of Appeals in *Ross v. Broadway Towers, Inc.*[3] will have a disastrous effect on the state law procedures and protections in Tennessee and throughout the United States. The court's holding opens the door for courts to preempt any and all state law tenant protections in federal housing if the tenant is being evicted for alleged criminal activity or for any other reason of interest to the federal government. Finally, the Tennessee Court of Appeals decision is an indication of the courts' confusion over the role of federal housing laws within state landlord-tenant law, which is a field traditionally regulated by the states. As an entity that represents the rights of the indigent – a group whose voice is all too seldomly heard – we ask permission to file this brief as *Amicus Curiae* under Supreme Court Rule 37.2.

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[3] *Id.*

I. BACKGROUND

A. The Tennessee Court of Appeals Holding in *Ross v. Broadway Towers, Inc.*

In *Ross v. Broadway Towers, Inc.*,[4] the Tennessee Court of Appeals addressed the issue of whether federal law preempts the various procedural and substantive protections granted under state landlord-tenant law. The specific statute at issue, Tennessee Code Annotated section 66-28-508, provides: "If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."[5] The landlord in *Ross* had accepted rent without reservation, but the court held that the federal interest in evicting tenants accused of criminal activity preempts the due process guarantees in section 66-28-508.[6]

The holding in *Ross* could have nationwide impact because it preempts a tenant protection recognized by many states as part of the Uniform Residential Landlord and Tenant Act (URLTA)[7] or common law. Moreover, the reasoning of *Ross* suggests that any state-level tenant protections could be preempted solely on the basis of the federal interest in evicting tenants who are allegedly involved in criminal activity or for any other reason of interest to the federal government. As discussed *infra*, preemption analysis does not support the Tennessee Court of Appeals's decision. The court failed to consider that the federal laws at issue clearly indicate in express language

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[4] *Id.* Petitioners requested permission to appeal the decision to the Tennessee Supreme Court, but that court denied certiorari. *Ross v. Broadway Towers, Inc.*, E2006-00033-SC-R11-CV, 2007 Tenn. LEXIS 622, at *1 (Tenn. Sup. Ct. June 25, 2007).

[5] Tenn. Code Ann. § 66-28-508 (2004).

[6] *Ross*, 228 S.W.3d at 124.

[7] Unif. Residential Landlord & Tenant Act (URLTA) (amended 1974).

that Congress did not intend to preempt state eviction procedures or tenant procedural rights. Furthermore, the federal and state laws may be read together in such a way as to obviate the need for preemption.

B. The Uniform Residential Landlord and Tenant Act

The URLTA was drafted in 1972 as a means of acknowledging and codifying the evolution of modern, urban, residential landlord-tenant relationships.[8] The URLTA was designed as a "general act intended as a unified coverage of" the field.[9] Like many other national uniform acts, the URLTA is meant to clarify and standardize an area of traditional state law by drafting consistent statutes and encouraging their passage by each state. The broad scope of the URLTA includes jurisdictional provisions; descriptions of allowed and disallowed lease terms; landlords' and tenants' obligations and remedies; and prohibitions against retaliation, self-help, and "abuse of access."[10] Among the parties' rights and obligations are various methods by which either party may terminate the rental agreement and, in the case of termination for an alleged breach of the lease, a series of potential defenses that the allegedly breaching party may assert.[11]

The Tennessee General Assembly adopted the URLTA (Tennessee Uniform Residential Landlord and Tenant Act, or "TURLTA") in 1975[12] to govern the landlord-tenant relationship in all of its large counties.[13] The TURLTA specifies that it should be "liberally construed and applied

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[8] *See* URLTA § 1.102 & cmt.

[9] URLTA § 1.104 & cmt.

[10] *See generally* URLTA arts. I-V (stating these provisions in detail).

[11] *See generally* URLTA art. IV (providing various tenant and landlord remedies).

[12] 1975 Tenn. Pub. Acts 462.

[13] Tenn. Code Ann. § 66-28-102 (2004).

to promote its underlying purposes and policies."[14] Those purposes are to:

> (1) [s]implify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; (2) [e]ncourage landlord and tenant to maintain and improve the quality of housing; (3) [p]romote equal protection to all parties; and (4) [m]ake uniform the law in Tennessee.[15]

One of TURLTA's provisions, Tennessee Code Annotated section 66-28-508, provides: "If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."[16] The basis of this provision is a well-known contract principle of waiver.[17] A landlord cannot claim that a rental agreement is invalid while at the same time accepting rent without reservation as if the lease were valid.

C. The National Housing Act and Its Enacting Regulations

Section 1701q of the National Housing Act ("the Act") provides for federally funded housing for elderly persons.[18] The Act governs the loans, mortgages, and insurance to be used in funding these housing projects and places the projects under the supervision and coordination of the United States Department of Housing and

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[14] § 66-28-103.

[15] § 66-28-103(b)(1)-(4).

[16] § 66-28-508.

[17] *See, e.g.*, Restatement (Second) of Contracts § 246(1) (1981); *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport*, 169 S.W.3d 627, 635-36 (Tenn. Ct. App. 2004).

[18] 12 U.S.C. § 1701q (2000).

Urban Development (HUD).[19] Pursuant to this mandate, HUD has promulgated regulations describing standards for facility design, costs, and project management, including collection and use of security deposits and selection of tenants.[20] The purpose of the Act is to "provide Federal capital advances and project rental assistance . . . for housing projects serving elderly households . . . [and] provide a range of services that are tailored to the needs of the residents."[21] The regulations also require landlords to include provisions in their rental agreements stating that the lease may be terminated for "[a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises). . . ."[22]

The HUD regulations only specify a particular lease provision that must be included; they say nothing about state contract law or state eviction proceedings. Nowhere in the regulations does the Department set forth or modify state contract defenses or eviction procedures, which HUD instead leaves specifically to state law. HUD provides:

> State and local law. A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted under Part 246 of this chapter or by other action of the United States.[23]

The statute at issue here, section 66-28-508 of TURLTA, as well as identical statutes and judicially created laws in 42 other states, provide tenants such a procedural right.

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[19] *Id.*; *see* § 1701c (empowering the Secretary of Housing and Urban Development).

[20] 24 C.F.R. pt. 891 (2006).

[21] § 891.100.

[22] § 5.859(a); *see* § 891.430 (incorporating the provisions of § 5.859 by reference).

[23] § 247.6(c); *cf.* § 246 (relating to local rent control).

II. ARGUMENT

A. Review is warranted on the issue of whether the housing laws in at least 43 states are preempted by a HUD regulation.

1. Many states have adopted the same landlord-tenant laws, but federal and state courts in those jurisdictions have treated the preemption issue inconsistently.

Twenty-one states have passed the URLTA in one form or another.[24] Furthermore, 14 of those states have passed the statute that is the subject of this case,[25] while an additional 29 states use a common law rule that mirrors the URLTA provision.[26]

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[24] Unif. Residential Landlord & Tenant Act, 7B U.L.A. 1, 1 (Supp. 2007); *see* Ala. Code §§ 35-9A-101 to -603 (1991); Alaska Stat. §§ 34.03.010 to 34.03.380 (2006); Ariz. Rev. Stat. Ann. §§ 33-1301 to -1381 (2007); Conn. Gen. Stat. §§ 47a-1 to 47a-20a (2006); Fla. Stat. §§ 83.40-83.67 (2000); Haw. Rev. Stat. §§ 521-1 to -78 (2006); Iowa Code §§ 562A.1-562A.37 (1992); Kan. Stat. Ann. §§ 58-2540 to 58-2573 (2005); Ky. Rev. Stat. Ann. §§ 383.500-383.715 (West 2002); Mich. Comp. Laws §§ 554.601-554.616 (2005); Miss. Code Ann. §§ 89-8-1 to 89-8-52 (1999); Mont. Code Ann. § 70-24-101 to 70-24-442 (2007); Neb. Rev. Stat. §§ 76-1401 to 76-1449 (2003); N.M. Stat. §§ 47-8-1 to 47-8-52 (1978); Okla. Stat. tit. 41, §§ 101-136 (1999); Or. Rev. Stat. §§ 90.100-90.940 (2005); R.I. Gen. Laws §§ 34-18-1 to 34-18-57 (1995); S.C. Code Ann. §§ 27-40-10 to 27-40-940 (2007); Tenn. Code Ann. §§ 66-28-101 to -521 (2004); Va. Code Ann. §§ 55-248.2 to 55-248.40 (2007); Wash. Rev. Code §§ 59.18.010-59.18.430 (2006).

[25] Ala. Code § 35-9A-424 (1991); Alaska Stat. 34.03.240 (2006); Ariz. Rev. Stat. Ann. § 33-1371 (2007); Conn. Gen. Stat. § 47a-19 (2006); Fla. Stat. § 83.56(5) (2000); Iowa Code § 562A.30 (1992); Kan. Stat. Ann. § 58-2566 (2005); Ky. Rev. Stat. Ann. § 383.675 (2002); Mont. Code Ann. § 70-24-243 (2007); Neb. Rev. Stat. § 76-1433 (2003); Or. Rev. Stat. § 90.415(1)(A) (2005); R.I. Gen. Laws § 34-18-41 (1995); Tenn. Code Ann. § 66-28-508 (2004); Va. Code Ann. § 55-248.34:1 (2007).

[26] *See, e.g.*, *Abernathy v. Adous*, 49 S.W.3d 884, 889 (Ark. App. 2004) (commercial lease); *Savett v. Davis*, 29 Cal. App. 4th Supp. 13, 16 (Cal. App. Dep't Super. Ct. 1994); *Merkowitz v. Mahoney*, 215 P.2d 317, 320 (Colo. 1949); *Shannon & Luchs Co. v. Tindal*, 415 A.2d 805, 806 (D.C. 1980); *Oastler v. Wright*, 40 S.E.2d 531, 533-34 (Ga. 1946); *Riverside Dev. Co. v. Ritchie*, 650 P.2d 657, 662 (Idaho 1982); *Wang v.*

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The state and federal courts are split on the issue of whether and when federal preemption occurs in the housing area.[27] Two state appellate courts that have

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Marcus Brush Co., 823 N.E.2d 140, 141 (Ill. App. 2005) ("The acceptance of rent, even after a notice to quit has been given, is not itself a waiver, but merely evidence to be considered in accordance with all the circumstances."); *HK New Plan Marwood Sunshine Cheyenne, LLC v. Onofrey Food Servs.*, 846 N.E.2d 318, 324 (Ind. App. 2006); *Housing Auth. of Town of Lake Providence v. Burks*, 486 So.2d 1068, 1069 (La. App. 1986); *Slater v. Krinsky*, 416 N.E.2d 983, 985 (Mass. App. 1981); *Chertkof v. Southland Corp.*, 371 A.2d 124, 127 (Md. 1977); *Barber v. Stone*, 62 N.W. 139, 140 (Mich. 1895); *Oak Glen of Edina v. Brewington*, 642 N.W.2d 481, 486 (Minn. App. 2002); *Langdon v. United Rests., Inc.*, 205 S.W.3d 882, 890 (Mo. App. 2003) ("Performance of certain lease terms may be waived when a landlord, by expression or conduct, leads the tenant to believe strict compliance is not required. . . . Such belief may be reasonable when induced by the landlord's continued acceptance of rent payments . . ."); *Reno Realty & Inv. Co. v. Hornstein*, 301 P.2d 1051, 1054 (Nev. 1956) (commercial lease); *Coon v. Brickett*, 2 N.H. 163 (1819); *Jasontown Apartments v. Lynch*, 382 A.2d 688, 692 (N.J. Super. App. Div. 1978) ("Acceptance of rent after a notice changing tenancy or after (a) notice to quit does not necessarily operate to waive the notice. While the unconditional acceptance by a landlord of moneys as rent, which rent as accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of the notice to quit, waiver always rests on intent, and is ever a question of fact."); *Easterling v. Peterson*, 753 P.2d 902, 903 (N.M. 1988); *Atkin's Waste Materials, Inc. v. May*, 314 N.E.2d 871, 873 (N.Y. 1974); *Winder v. Martin*, 111 S.E. 708, 709 (N.C. 1922); *Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 845 (Ohio App. 1985); *Broken Arrow P'ship v. PBC Inv. Opportunities, Inc.*, 33 P.3d 694, 698 (Okla. Civ. App. 2001); *Brown v. Brown*, 64 A.2d 506, 507-08 (Pa. 1949) (acceptance of rent is evidence of waiver); *G.C. Murphy Co. v. Lack*, 404 S.W.2d 853, 859 (Tex. Ct. Civ. App. 1966); *Maidstone v. Stevens*, 7 Vt. 487 (1835); *Wilson v. Daniels*, 198 P.2d 496, 500 (Wash. 1949); *Dunbar Housing Auth. v. Nesmith*, 400 S.E.2d 296, 299 (W. Va. 1990); *Gomber v. Hackett*, 6 Wis. 323 (1857); *Larsen v. Sjogren*, 226 P.2d 177, 183 (Wyo. 1951).

[27] *See, e.g., TOPA Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1072 (9th Cir. 2003) ("Here, although Congress (or perhaps HUD) could have chosen to preempt [state] rent control ordinances . . . it did not do so. In the absence of such action, we will not arrogate that power to ourselves."); *Booker v. Edwards*, 99 F.3d 1165, 1169 (D.C. Cir. 1996) (holding that the federal scheme was sufficiently robust on the question at issue, even if federal law is not meant to completely occupy the field);

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directly considered whether federal law preempts state law protections for public housing tenants have found preemption.[28] The Supreme Court of Virginia, on the other hand, has found that the congressional policy of providing safe and affordable housing did not "re-write" state landlord-tenant law and that "the intent of Congress was to leave the applicable state law undisturbed."[29] Further, this Honorable Court has indicated in dicta that when a public housing landlord initiates eviction proceedings because of drug-related activity, the question of whether the tenant received proper notice is for the state court.[30]

Preemption law has been in a state of flux following this Honorable Court's decision in *Cipollone v. Liggett Group, Inc.*[31] In particular, confused application of the majority and plurality opinions in that case has led to disagreement about when to apply the presumption against federal preemption in areas of law traditionally regulated by the states.[32] There has been growing concern since *Cipollone* that the presumption against preemption has ceased to operate[33] and debate about whether it should continue to exist.[34]

Scarborough v. Winn Residential LLP/Atl. Terrace Apartments, 890 A.2d 249 (D.C. Ct. App. 2006) (holding that federal law preempted a local ordinance because the ordinance would interfere with Congress's objectives in passing the federal law).

[28] *Scarborough v. Winn Residential, LLP/Atl. Terrace Apartments*, 290 A.2d 249 (D.C. Ct. App. 2006); *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113 (Tenn. Ct. App. 2006).

[29] *Carter v. Meadowgreen Assocs.*, 597 S.E.2d 82, 84 (Va. 2004).

[30] *Dep't of Housing & Urb. Dev. v. Rucker*, 535 U.S. 125, 135-36 (2002).

[31] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

[32] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[33] *See, e.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967 (2002) (arguing that recent Court decisions have regularly overridden any presumption against preemption); Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hast. L.J. 431 (2002) (same); Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 Ariz. L. Rev. 1379 (1998) (same).

[34] *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2087 (2000) (arguing that "the constitutional structure

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Legal scholarship abounds with criticism of the "schizophrenic" nature of preemption law.[35] In addition, the courts have been grossly inconsistent when attempting to apply preemption analysis.[36] It is high time to settle this disagreement and give the lower courts and litigants some direction in applying preemption doctrine. Therefore, review is warranted because the states, their indigent citizens, their courts, and the federal courts need clarification on this important issue.

2. Preemption would deny tenants their due process rights under state law and diminish the states' police power.

As discussed *supra*, Tennessee and more than 20 other states adopted the URLTA in order to guarantee the equal rights of tenants and landlords.[37] The structure of the URLTA supports that goal by distributing risks and burdens evenly between the landlord and tenant. Preemption of the state eviction procedures tips the scale in favor

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of federalism does not admit to a general presumption against federal preemption of state law"); *see also Cipollone*, 505 U.S. at 545 (J. Scalia, concurring in part and dissenting in part).

[35] Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 560 (1997); *see, e.g.*, Stacy A. Carroll, Note, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 Ga. L. Rev. 797, 818 (2002).

[36] *See, e.g.*, *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006) (applying the *Geier* rule only to cases in which implied conflict preemption exists and applying the *Cipollone* "rule" to the implied field preemption analysis); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1008 (E.D. Cal. 2002) ("The Supreme Court has described the applicable inquiry in assessing whether a conflict exists between state and federal law in a numbers of manners."); *Sprietsma v. Mercury Marine*, 757 N.E.2d 75 (Ill. 2001) (finding no express preemption provision in Federal Boat Safety Act), *overruled by* 537 U.S. 51 (2002) (finding an express preemption provision in Federal Boat Safety Act).

[37] Tenn. Code Ann. § 66-28-103(b)(3) (2004).

of the landlord, who, if the tenant commits a crime, can later claim that the lease is invalid while having continued to accept rent as if the lease had remained valid. It is the prerogative of the states to establish the balance in landlord-tenant relationships and, as evidenced by the lack of language in federal housing law to the contrary, in eviction procedures. If federal law can disrupt this balance, the state's police power has been irretrievably diminished. Review is warranted because the state and federal courts need guidance on how to apply preemption analysis properly so as to preserve states' powers and tenants' rights.

B. To promote the predictability of housing law, this Honorable Court should clarify that state law eviction procedures are not preempted by federal law.

Preemption of state law can occur in three different situations. First, a federal law can expressly preempt state law.[38] Second, federal law can implicitly preempt state law if federal law so pervasively occupies a field that the introduction of state law into that field would inevitably interfere with federal law's effectiveness in that field.[39] Third, federal law can implicitly preempt state law if the state law actually conflicts with the federal law.[40] Even then, preemption extends only insofar as the conflicting laws cannot be construed harmoniously.[41]

This case involves neither express nor field preemption.[42] Congress did not state anywhere in the Act that it or the HUD regulations should preempt state law. In fact, the

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[38] *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525 (1977).

[39] *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898).

[40] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983).

[41] *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 182-83 (1978).

[42] The parties agreed to this at the state level. *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 122 (Tenn. Ct. App. 2006).

regulations – which have not been overruled by Congress – specifically provide that the federal law is to work in concert with the state laws.[43] Further, field preemption is not present because federal housing law constitutes only a small portion of the laws governing the landlord-tenant relationship.

The issue in this case, then, is whether the state law sufficiently conflicts with the federal law to warrant a finding of conflict preemption. First, in areas of traditional state regulation such as landlord-tenant law, there is a presumption against federal preemption.[44]

Second, section 66-28-508 and similar laws in other states do not conflict with the federal housing law because the federal law expressly relies upon state law to supply the eviction procedures, even when federal housing law governs other aspects of the landlord-tenant relationship. The structure of the federal law and regulations at issue make this point particularly obvious. The federal statute at issue, 42 U.S.C. § 1437d(l)(6), and the accompanying regulations all proceed from the assumption that the actual eviction of tenants will be accomplished in state court under state law. We know this is so because neither Congress nor HUD has created a separate or different federal eviction procedure. Moreover, the federal statutes and regulations at issue here only require the inclusion of a provision in the lease itself; they say nothing to suggest that the inclusion of this lease provision should wipe out some or all state law tenant protections.[45]

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[43] *See* 24 C.F.R. § 247.6(c) (2006).

[44] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[45] One of the HUD publications announcing the "one strike and you're out" lease provisions also makes the continuing viability of state eviction procedures clear. HUD states that "[i]n 47 states HUD has determined that the state landlord-tenant process provides the necessary pre-eviction hearing and other basic elements of due process, so that PHAs can exclude criminal activity evictions from their grievance procedures and proceed entirely through the state court system." HUD Directive Number 96-16, *available at* http://www.hudclips.org/sub_nonhud/html/nph-brs.cgi?d=PIHN&s1=96-$%5Bno%5D&op1=AND&

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It is also worth noting that when HUD wants to preempt state law, it does not hesitate to do so. HUD regulations explicitly preempt state and local rent control laws[46] and any state laws that impose jurisdictional limitations contrary to the Section 8 voucher program.[47]

Finally, even if section 66-28-508 and the similar laws did warrant application of conflict preemption analysis, well-established preemption law favors reconciling the statutes to the greatest extent possible so they may work together harmoniously, rather than nullifying one rule in its entirety. In this case, reconciliation is quite simple: Federal law requires the inclusion of certain lease provisions, but state law governs eviction proceedings if those lease provisions are violated.

1. In areas traditionally regulated by the states, there is a presumption against preemption.

There is a presumption against federal preemption of state laws in areas traditionally regulated by the states.[48] To overcome this presumption, Congress must have intended the federal law to preempt state law in the state-regulated areas.[49] Thus, "the purpose of Congress is the ultimate touchstone" of the inquiry into whether federal

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SECT1=TXTHLB&SECT5=PIHN&u=/html/shortcut.htm&p=1&r=78&f=G. This same directive goes on to note that any procedural defenses that are not preempted may be utilized by tenants in state eviction proceedings. *See id.*

[46] *See* 24 C.F.R. § 850.153 (2006) (preempting state and local rent control laws under Housing Development Grant Program).

[47] *See* 24 C.F.R. § 982.354(b) (2006) (preempting any state law imposing limitation on jurisdiction of local housing authority when voucher holder moves to another area under portability provision of Section 8).

[48] *Id.*

[49] *Id.*

law preempts state law.[50] Congressional intent may be demonstrated by explicit language in the federal law or by the law's "structure and purpose."[51]

This case involves landlord-tenant law, which is an area traditionally regulated by states even when HUD provides for funding.[52] Therefore, the presumption against preemption applies. The presumption can only be rebutted with evidence of Congress's intent that state law should be preempted; as discussed *supra*, Congress's clear intent was for the federal housing regulations to work alongside state landlord-tenant law.[53] Furthermore, the structure and purpose of the Act indicate that Congress intended to legislate only with respect to funding and management of public housing projects, not to interfere with state housing courts' jurisdiction or proceedings. Therefore, because neither the federal statutes nor the enacting regulations in any way reflect a congressional intent to preempt state landlord-tenant law, the presumption against preemption in areas traditionally regulated by the states dictates that Tennessee Code Annotated section 66-28-508 must not be preempted.

2. State waiver laws do not conflict with the relevant federal housing regulations because both laws can, and therefore must, be construed harmoniously according to established preemption law.

The precepts of federalism require that the courts preserve and uphold state law wherever possible, deferring

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[50] *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (alterations omitted).

[51] *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525 (1977).

[52] *See Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Independence Park Apartments v. United States*, 449 F.3d 1235, 1243 (Fed. Cir. 2006).

[53] *See* 24 C.F.R. § 247.6(c) (2006).

to federal law only in cases of clear preemption.[54] "Because the States are independent sovereigns in our federal system, [this Court has] long presumed that Congress does not cavalierly pre-empt" state laws.[55] Conflict preemption analysis demands that courts first attempt to harmonize state and federal laws.[56] Courts should only find preemption where a private party would be unable to comply with both laws or where the Congress has made "a clear and unambiguous statement of intent to preempt" the state law.[57] In addition, "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."[58] Under a properly applied preemption analysis, then, federal laws that dictate when landlords should initiate eviction proceedings do not override state laws defining the defenses available to tenants in such proceedings.

This Court has long held that state laws, especially in areas traditionally occupied by the states, are "not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[59] Even if a potential conflict exists, the Court has traditionally favored a narrow interpretation of the federal statute's reach[60] rather than a reading that would merely favor a broad statutory purpose.[61]

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[54] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 450 (2005).

[55] *Medtronic, Inc.*, 518 U.S. at 485.

[56] *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 182-83 (1978).

[57] Carroll, *supra* note 35, at 821-22.

[58] *N.Y. State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

[59] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Medtronic, Inc.*, 518 U.S. at 485; *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

[60] *Ray*, 435 U.S. at 182-83.

[61] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

In fact, the Court has used conflict preemption analysis specifically to ensure "that *both* state and federal regulatory schemes may operate with some degree of harmony."[62] Proper preemption analysis requires that the courts integrate federal and state laws in such a way as to avoid conflict preemption wherever possible. "[T]he [C]ourt has recognized the practical importance of preserving local independence, . . . *i.e.*, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy."[63] When analyzing laws or regulations for a potential conflict, the courts must begin with the assumption that no true conflict exists and attempt to preserve as much as possible of both the state and federal schemes.

In *Pacific Gas & Electric Co.*, the Court noted the standard for evaluating implied conflict preemption:

> [W]here Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it *actually conflicts* with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

Congress's intent may be discerned not only from the language of the statute but also from the structure of the

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[62] *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 516 n.12 (1989).

[63] *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

[64] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added).

statute and the overarching statutory scheme.[65] In the case of federal housing, this leads to a finding that federal laws imposing requirements on landlords do not preempt state laws offering defenses to tenants.

The Act focuses on funding, insurance, costs, and facility design and management of public housing,[66] while the related statute 42 U.S.C. § 1437d(l)(6) (2000) addresses the "terms and conditions" of public housing leases and their "termination." None of those provisions ever describe the procedures or processes through which evictions should be carried out. In fact, nowhere in federal housing law does Congress establish any procedure for eviction. If Congress had intended to upend or eradicate state eviction procedures, it certainly could have provided its own eviction procedures in their place. It is clear from the structure of the federal statutes that Congress intended the state law to continue to provide the eviction procedures.

The enacting HUD regulations further indicate their reliance on state eviction procedures: "The landlord shall not evict any tenant except by judicial action pursuant to State or local law and in accordance with the requirements of this subpart."[67] Finally, the regulations explicitly provide that "[a] tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart. . . ."[68] Clearly, HUD contemplated how the state and federal law would interact in this context, and its description and expression of congressional intent – which Congress has not countermanded – plainly show that the HUD regulations are not intended to preempt the rights tenants have under state law.

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[65] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-73 (2000).

[66] *See* discussion *supra* Part I.C.

[67] 24 C.F.R. § 247.6(a) (2006).

[68] § 247.6(c).

Furthermore, the laws do not impose conflicting obligations on any party so as to make compliance a "physical impossibility."[69] It is a well-established principle that a landlord's cause for terminating a tenancy, whether created by statute or by the terms of the lease, is not incompatible with a tenant's affirmative defenses to such termination.[70] Those defenses do not impose any duty on the landlord, much less one that would prevent him from complying with the federal regulations.

Finally, the state laws do not prevent the federal laws from serving their intended purpose. In fact, "[h]ousing is an area where Congress intended . . . two complementary systems of regulations to *supplement each other*, with local law providing the general background law and federal law intervening only where federal involvement is deemed necessary."[71] Congress has explicitly and repeatedly relied upon state and local law to preserve tenants' due process rights since it created federally assisted public housing in 1934.[72] If Congress had intended to reverse this policy and

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[69] *Pac. Gas & Elec. Co.*, 461 U.S. at 204 (quoting *Fla. Lime*, 373 U.S. at 142-43).

[70] *See, e.g., Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 284 (1969) (dictum) ("[W]e have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts."); Restatement (Second) of Property: Landlord & Tenant §§ 5.4-5.5 (1977) (stating that landlord's failure to maintain property in habitable condition justifies tenant in withholding rent and citing, in reporter's notes, cases that refer to this as a defense to eviction for nonpayment of rent).

[71] *Rowe v. Pierce*, 622 F. Supp. 1030, 1033 (D.D.C. 1985) (emphasis added).

[72] National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701 et seq.) (recognizing state jurisdiction over public housing projects and preserving tenants' civil rights under state and local law); *U.S. Dep't of Housing & Urban Dev. v. Rucker*, Br. for Amici Curiae AARP et al., Nos. 00-1770, 00-1781, 2001 WL 1820807, at *14-15 (U.S. Dec. 20, 2001) (discussing Congress's intervention in 1988 when HUD proposed eliminating tenants' "affirmative legal or

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destroy a key element of state housing law, it surely would have done so explicitly. To strip all defenses – and only the defenses – from state law eviction proceedings, especially with neither express congressional nor regulatory language as support, would throw off the entire balance of the state scheme as well as the very notion of federalism.

Instead, federal and state housing laws continue to coexist within the procedural frameworks established by the states. The federal statutes and regulations are written precisely to intrude in only a few circumscribed areas of housing law while leaving much of the procedural and substantive law to the states.[73] The states, meanwhile, provide a fully developed eviction procedure, of which the tenant's affirmative defenses are part and parcel. The federal and state laws at issue here are easily reconciled with each other, so preemption should not apply and the state statutes should be given full force.

III. CONCLUSION

For the reasons set forth above, this Honorable Court must grant certiorari to Petitioners so it may resolve a crucial question of preemption and federalism and provide guidance to the lower courts, the state courts, and the representatives of the indigent elderly.

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equitable defense[s]" under state law in cases of eviction for drug-related criminal activity).

[73] *See* discussion *supra* Part I.C.

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THE ECONOMIC JUSTICE PROJECT OF THE NOTRE DAME LEGAL AID CLINIC
THE MICHIGAN CLINICAL LAW PROGRAM OF THE UNIVERSITY OF MICHIGAN LAW SCHOOL
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